

FINANCE DOCKET NO. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD
COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY--
CONTROL AND MERGER--SOUTHERN PACIFIC RAIL
CORPORATION, SOUTHERN PACIFIC TRANSPORTATION
COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
SPCSL CORP., AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

[Decision No. 47]¹

Decided September 9, 1996

This decision addresses certain details respecting the trackage rights
awarded to The Texas Mexican Railway Company in *Decision No. 44*.

¹ This decision embraces Finance Docket No. 32760 (Sub-No. 13), *Responsive Application--The Texas Mexican Railway Company*, and Finance Docket No. 32760 (Sub-No. 14), *Application for Terminal Trackage Rights Over Lines of The Houston Belt & Terminal Railway Company--The Texas Mexican Railway Company*.

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BY THE BOARD:²

BACKGROUND

Decision No. 44. In *Union Pacific/Southern Pacific Merger (Decision No. 44)*, 1 S.T.B. 233 (1996), we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company)³ and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company),⁴ subject to various conditions. Among other things, we granted The Texas Mexican Railway Company (Tex Mex) the trackage rights sought in its Sub-No. 13 responsive application and in its Sub-No. 14 terminal trackage rights application, subject to the restriction that all freight handled by Tex Mex pursuant to such trackage rights must have a prior or subsequent movement on Tex Mex's Laredo-Robstown-Corpus Christi line. See, *Decision No. 44*, 1 S.T.B. at 271-75 (relief requested by Tex Mex), at 421-26 (relief granted to Tex Mex), at 524 (our findings), and at 547-48 (ordering paragraphs 26 and 27). With respect to the precise details of the Sub-Nos. 13 and 14 trackage rights, we directed the interested parties to submit, by August 22, 1996, either agreed-upon terms or separate proposals. See, *Decision No. 44*, 1 S.T.B. at 547-48 (ordering paragraphs 26 and 27).⁵

² Proceedings pending before the Interstate Commerce Commission (ICC) on January 1, 1996, must be decided under the law in effect prior to that date if they involve functions retained by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. This proceeding was pending with the ICC prior to January 1, 1996, and relates to functions retained under Surface Transportation Board (Board) jurisdiction pursuant to new 49 U.S.C. 11102 and 11323-27. Citations are to the former sections of the statute, unless otherwise indicated.

³ Union Pacific Railroad Company (UPRR) and Missouri Pacific Railroad Company (MPRR) are referred to collectively as UP.

⁴ Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) are referred to collectively as SP.

⁵ With respect to the Sub-No. 13 trackage rights, the interested parties are Tex Mex and UP/SP. With respect to the Sub-No. 14 trackage rights, the interested parties are Tex Mex and the Houston Belt & Terminal Railway Company (HB&T).

Pleadings Submitted. UP/SP, Tex Mex, and HB&T have now submitted six pleadings: one by UP/SP and Tex Mex jointly (designated UP/SP-271/TM-42, but hereinafter referred to for convenience as UP/SP-271); three by Tex Mex separately (designated TM-40, TM-41, and TM-45); one by UP/SP separately (designated UP/SP-272); and one by HB&T separately (not designated, but hereinafter referred to for convenience as HB&T-1). BNSF⁶ has submitted a reply (designated BN/SF-64) to the TM-41 and UP/SP-272 submissions.⁷

Sub-No. 13 Trackage Rights. With respect to the Sub-No. 13 trackage rights, Tex Mex and UP/SP have reached agreement as to many of the terms that will govern Tex Mex's operations. *See*, UP/SP-271, Attachment A.⁸ With respect to seven matters, however, Tex Mex and UP/SP have not reached agreement, and they have therefore submitted separate proposals respecting these matters. *See*, UP/SP-271 at 2-3 (description of the seven matters), TM-41 (Tex Mex's proposals with respect thereto), and UP/SP-272 at 2-21 (UP/SP's proposals with respect thereto).

Sub-No. 14 Trackage Rights. With respect to the Sub-No. 14 trackage rights, Tex Mex and HB&T have not reached agreement as to any terms, although only two matters (routes and compensation) appear to be in dispute. Tex Mex has submitted its proposals respecting in particular these two matters, and respecting in general all the terms that would be included in an agreement. *See*, TM-40. UP/SP, speaking on behalf of HB&T, has submitted its proposals respecting only the two particular matters. *See*, UP/SP-272 at 22-23.⁹ HB&T, speaking on its own behalf, claims that the Sub-No. 14 parties (Tex Mex and HB&T) have not actually had any discussions respecting any matters except the two particular matters addressed by Tex Mex and UP/SP. *See*, HB&T-1.

⁶ Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) are referred to collectively as BNSF.

⁷ Two errata pleadings have also been submitted: one by UP/SP and Tex Mex jointly (designated "UP/SP-273/TM-43"); and one by UP/SP separately (designated UP/SP-274).

⁸ Attachment A consists of a 12-page body (the trackage rights terms) and three appendices: Exhibit A (a map of Tex Mex's trackage rights route); Exhibit B (general conditions); and Attachment 1 (dispatching protocols). Exhibit A, however, was not submitted with the UP/SP-271 version of Attachment A, because the route of the Tex Mex trackage rights is one of the matters still in dispute. Exhibit B and Attachment 1 were submitted with the UP/SP-271 version of Attachment A.

⁹ HB&T is owned in equal shares by UP/SP and BNSF. *See* TM-40 at 8 n.4. UP/SP's 50% ownership interest in HB&T is held by MPRR. *See* UP/SP-22 at 63.

Preliminary Matter: Administrative Reconsideration or Judicial Review. Both Tex Mex and UP/SP have emphasized that the partial "agreement" they have reached with respect to the Sub-No. 13 trackage rights does not necessarily represent concurrence with our prior decision, and we therefore understand that both or either may seek administrative reconsideration or judicial review of the relevant portions of *Decision No. 44*. See, TM-40 at 1 n.1; TM-41 at 3 n.2; UP/SP-272 at 2 n.2.¹⁰

Preliminary Matter: BNSF Concurrence. In *Decision No. 44*, we imposed various conditions to our approval of the primary application, including, among other things, the terms of the BNSF agreement. *Decision No. 44*, 1 S.T.B. at 246-47 and at 545 (ordering paragraph 6).¹¹ Section 14 of the BNSF agreement provides, among other things, that UP and SP shall not, without the written consent of BNSF, "enter into agreements with other parties which would grant rights to other parties granted to BNSF or inconsistent with those granted to BNSF under this Agreement which would substantially impair the overall economic value of rights to BNSF under this Agreement." UP/SP indicates that BNSF, relying on Section 14, has asserted that any "agreement" implementing the Tex Mex trackage rights requires BNSF's written consent, which, BNSF has suggested, will be forthcoming only on terms acceptable to BNSF. UP/SP adds, however, that, in its view, BNSF is wrong respecting the scope of Section 14; in UP/SP's view, any "agreement" it is compelled to enter into with Tex Mex is not an "agreement" for purposes of Section 14. UP/SP-272 at 2 n.2. The trackage rights granted to Tex Mex in *Decision No. 44* constitute a condition imposed on the merger, and those rights are not contingent upon BNSF's approval.

DISCUSSION AND CONCLUSIONS

IN GENERAL. In its applications filed in the Sub-Nos. 13 and 14 dockets, Tex Mex sought: (i) trackage rights over UP/SP lines from Robstown and Corpus Christi to Houston, and on to a connection with The Kansas City

¹⁰ Petitions for administrative reconsideration were due on September 3, 1996. Tex Mex filed, on that date, a petition to reopen (in essence, a petition for administrative reconsideration of) *Decision No. 44*.

¹¹ The contents of the BNSF agreement are described in *Decision No. 44*, 1 S.T.B. at 247 n.15.

Southern Railway Company (KCS) at Beaumont; and (ii) related terminal trackage rights on HB&T. Tex Mex clearly indicated that the trackage rights it sought: (a) were intended to allow Tex Mex both to transport overhead traffic and to serve all local shippers currently capable of receiving service from both UP and SP, directly or through reciprocal switching; and (b) would include full rights to interchange traffic at Houston (with UP/SP, BNSF, HB&T, and PTR¹²) and at Beaumont (with UP/SP, BNSF, and KCS). See, *Decision No. 44*, 1 S.T.B. at 273.

In *Decision No. 44*, we granted Tex Mex the trackage rights sought in its Sub-No. 13 responsive application and in its Sub-No. 14 terminal trackage rights application, restricted in both instances to the transportation of freight having a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line. We referred to our action in the Sub-No. 13 docket as a "partial grant" of the Tex Mex responsive application, see, *Decision No. 44*, 1 S.T.B. at 424; and our action in the Sub-No. 14 docket should similarly be referred to as a partial grant of the Tex Mex terminal trackage rights application.

RELIEF GRANTED: MAIN LINE TRACKAGE RIGHTS. Tex Mex requested and we granted trackage rights over: (1) the UP line between Robstown and Placedo; (2) the UP line between Corpus Christi and Odem, via Savage Lane to Viola Yard; (3) the SP line between Placedo and Victoria; (4) the SP line between Victoria and Flatonia; (5) the SP line between Flatonia and West Junction; (6) the UP line from Gulf Coast Junction through Settegast Junction (referred to on some maps as "HBT Junction") to Amelia;¹³ and (7) the joint UP/SP line from Amelia to Beaumont, and the connection with KCS at the Neches River Draw Bridge in Beaumont. See, *Decision No. 44*, 1 S.T.B. at 273.

RELIEF GRANTED: HOUSTON TRACKAGE RIGHTS ON SP. Tex Mex requested and we granted trackage rights in Houston over: (1) the SP line from West Junction through Bellaire Junction to Eureka at SP MP 5.37 (Chaney

¹² The Port Terminal Railway Association is referred to as PTR^A.

¹³ With respect to item (6), we note that Tex Mex actually requested trackage rights over either (a) the UP line from Gulf Coast Junction through Settegast Junction to Amelia (the "UP main line option"), or (b) the SP line from Tower 87 to Amelia (the "SP main line option"); and we also note that Tex Mex further requested that UP/SP be required to elect which option it would prefer Tex Mex to operate. See, *Decision No. 44*, 1 S.T.B. at 273. UP/SP has elected the UP main line option. See, UP/SP-272 at 4 n.3; see also, UP/SP-272, V.S. King at 2 n.2 and at 7 n.5.

RELIEF GRANTED: HOUSTON TRACKAGE RIGHTS ON SP. Tex Mex requested and we granted trackage rights in Houston over: (1) the SP line from West Junction through Bellaire Junction to Eureka at SP MP 5.37 (Chaney Junction); (2) the SP line from SP MP 5.37 to SP MP 360.7 near Tower 26 via the Houston Passenger station;¹⁴ (3) the SP line from SP MP 5.37 to SP MP 360.7 near Tower 26 via the Hardy Street Yard; (4) the SP line from SP MP 360.7 near Tower 26 to the connection with HB&T at Quitman Street near SP MP 1.5; and (5) the SP line from West Junction to the connection with PTR A at Katy Neck (GH&H Junction), by way of Pierce Junction. *See Decision No. 44*, 1 S.T.B. at 273-74.¹⁵

RELIEF GRANTED: HOUSTON TRACKAGE RIGHTS ON HB&T. Tex Mex requested and we granted trackage rights in Houston over: (1) the HB&T line from the Quitman Street connection with SP to the Gulf Coast Junction connection with UP;¹⁶ and (2) the HB&T line from its connection with SP at

¹⁴ UP/SP claims that the item (2) line segment "does not connect with the remainder of Tex Mex's proposed route." UP/SP-272 at 7 n.5. We note: that the line segments described in items (2) and (3) both run from SP MP 5.37 to SP MP 360.7 near Tower 26; that the line segment described in item (2) runs via the Houston Passenger station, whereas the line segment described in item (3) runs via the Hardy Street Yard; and that visual inspection of the maps provided by the parties appears to indicate that the item (2) line segment does indeed connect with the remainder of Tex Mex's proposed route. UP/SP may be referencing a physical obstruction not revealed by our maps, perhaps including a physical layout that makes it impossible for trains passing the Houston Passenger station to travel north in the direction of Quitman Street. *See* UP/SP-272, V.S. King at 10 n.7 (suggestion that track configuration would not allow the Houston Passenger station line to be used in conjunction with a route over UP's Houston-Beaumont line). UP/SP and Tex Mex may wish to consider this matter further.

¹⁵ With respect to the items shown in the body as items (4) and (5), Tex Mex actually requested: (4) if the UP main line option is elected, the SP line from SP MP 360.7 near Tower 26 to the connection with HB&T at Quitman Street near SP MP 1.5; (5) if the SP main line option is elected, the SP line from Tower 26 through Tower 87 to the SP main line to Amelia; and (6) the SP line from West Junction to the connection with PTR A at Katy Neck (GH&H Junction), by way of Pierce Junction. Because UP/SP has elected the UP main line option, we have rephrased item (4), deleted the original item (5), and renumbered item (6) as item (5).

¹⁶ With respect to item (1), we note that Tex Mex actually requested the item (1) trackage rights "if the UP main line option is elected." Because UP/SP has elected the UP main line option, we have rephrased item (1) to eliminate the contingency.

T&NO Junction (Tower 81) to its connection with UP at Settegast Junction.¹⁷ See *Decision No. 44*, 1 S.T.B. at 274.

RELIEF GRANTED: HOUSTON TERMINAL FACILITIES. Tex Mex requested and we granted the right to use the following yards and other terminal facilities: (1) SP's Glidden Yard; (2) interchanges with PTR A at the North Yard, Manchester Yard, and Pasadena Yard; and (3) interchanges with HB&T at HB&T's New South Yard. See *Decision No. 44*, 1 S.T.B. at 274.

ROUTES THROUGH HOUSTON. The trackage rights granted to Tex Mex include trackage rights over SP's Flatonia-Houston line (west of Houston) and over UP's Houston-Beaumont line (east of Houston). SP's Flatonia-Houston line enters the Houston terminal area from the west at the point known as West Junction, at which point it splits into two lines. One of the two lines runs north to Bellaire Junction and Eureka; the other line runs east to and beyond T&NO Junction. UP's Houston-Beaumont line begins, in the Houston area, at the point known as Gulf Coast Junction (where it connects with HB&T) and then runs northeast to the point known as Settegast Junction.

There appear to be three routes that Tex Mex might use to operate between West Junction (just west of Houston) and either Gulf Coast Junction or Settegast Junction (just north of Houston): the SP route, the West Belt route, and the East Belt route. The SP route begins at West Junction and runs over SP's line via Bellaire Junction to SP MP 5.37 (Chaney Junction); then, runs over SP's line

¹⁷ UP/SP suggests, with respect to item (2), that our grant of trackage rights over the HB&T line between T&NO Junction (Tower 81) and Settegast Junction is "unworkable because it is missing a critical segment of UP-owned trackage through Settegast Yard, over which Tex Mex did not request rights." UP/SP-272 at 5-6. UP/SP indicates that the missing segment, which lies between SP Tower 87 and Settegast Junction and which runs through Settegast Yard, is actually owned by UP, "not HB&T as Tex Mex mistakenly indicated in its Responsive Application." UP/SP-272 at 6 n.4. UP/SP notes that, at one time, HB&T had leased trackage through Settegast Yard between SP Tower 87 and Settegast Junction; but, UP/SP adds, that lease has since terminated, and this trackage is now entirely UP's. UP/SP-272, V.S. King at 5 n.3. We reject UP/SP's suggestion that the item (2) trackage rights are unworkable for lack of a critical segment. The referenced segment is owned either by HB&T or by UP/SP. If it is owned by HB&T (as Tex Mex believed), it is properly included in the Sub-No. 14 trackage rights; and if it is owned by UP/SP (as UP/SP now claims), it will be regarded as having been included in the Sub-No. 13 trackage rights. UP/SP, having received adequate notice that the lines over which Tex Mex sought trackage rights included the referenced segment, cannot avail itself of a pleading rule designed to protect parties that have not received adequate notice of the relief sought against them.

from Chaney Junction to SP MP 360.7 near Tower 26;¹⁸ then, runs over SP's line from SP MP 360.7 near Tower 26 to the connection with HB&T at Quitman Street near SP MP 1.5; and, then, runs over the HB&T line from the Quitman Street connection with SP to the Gulf Coast Junction connection with UP. The West Belt route begins at West Junction and runs over SP's line to T&NO Junction (Tower 81); and, then, runs over the HB&T line from T&NO Junction (Tower 81) past the Congress Street Yard, and continues on past the HB&T/SP Quitman Street connection to the Gulf Coast Junction connection with UP. The East Belt route begins at West Junction and runs over SP's line to T&NO Junction (Tower 81); then, runs over the HB&T line from T&NO Junction (Tower 81) to a point between the Old South Yard and the New South Yard (the point is known as East Belt Junction) at which an HB&T line breaks off to the east/northeast; and, then, runs over this HB&T line past North Yard and Settegast Yard to the Settegast Junction connection with UP.¹⁹ The SP and West Belt routes overlap in part; the West Belt and East Belt routes likewise overlap in part; but the SP and East Belt routes do not overlap at all.

In *Decision No. 44*, we granted Tex Mex trackage rights over two of these routes--the SP route and the East Belt route. See *Decision No. 44*, 1 S.T.B. at 421-426 (discussion of our rationale for granting Tex Mex the trackage rights it had sought, subject only to the restriction respecting traffic having a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line). We did not discuss, in *Decision No. 44*, the relative merits of the SP and East Belt routes (either vis-à-vis each other or vis-à-vis the West Belt route), and we similarly did not discuss the merits of granting Tex Mex two routes, as opposed to one route, through Houston. We did not discuss these matters because UP/SP had given no indication that either the SP route or the East Belt route would present any difficulties, and because UP/SP had similarly given no indication that it would in any way be burdened if Tex Mex were given two Houston routes

¹⁸ Between Chaney Junction and SP MP 360.7 near Tower 26, the SP route, as previously noted, consists of two separate but parallel segments, one running by the Houston Passenger station and the other running by the Hardy Street Yard. UP/SP, as also previously noted, has suggested that the segment that runs by the Houston Passenger Station does not connect with the remainder of Tex Mex's proposed route.

¹⁹ As previously noted, UP/SP now claims that the segment of the East Belt route that lies between SP Tower 87 and Settegast Junction is actually owned by UP and not by HB&T.

as opposed to only one. *See*, UP/SP-230 at 300-307 (narrative discussion of UP/SP's opposition to the trackage rights sought by Tex Mex; but no mention of any problems with either the SP route or the East Belt route). *See also*, UP/SP-231, Part B, Tab 17 at 93-135 (extensive discussion by UP/SP's witness Richard B. Peterson of perceived flaws in the Tex Mex trackage rights; but, again, no mention of any problems with either the SP route or the East Belt route). Indeed, UP/SP's witness R. Bradley King explicitly stated that UP/SP had no operational or service objections to the trackage rights sought by Tex Mex:

To take some examples in this case, although we see absolutely no reason why Tex Mex should be given trackage rights over SP from Robstown to Beaumont (or anywhere else), and we believe Tex Mex would provide very inferior service compared to BN/Santa Fe, we have no operational or service objection to the trackage rights Tex Mex proposes.

UP/SP-232, Tab A at 26 (emphasis added). *See also*, UP/SP-232, Tab A at 16 (Mr. King indicated that the trackage rights sought by Tex Mex might run counter to Tex Mex's own interests, but would not adversely impact UP/SP: "Operationally, UP and SP could accommodate Tex Mex's choice of routes, although the UP/SP line between Houston and Flatonia is quite busy. However, this route would slow Tex Mex trains by many hours compared to the BN/Santa Fe route.").

UP/SP'S NEW ARGUMENTS. UP/SP, having had an opportunity to make a "careful evaluation" of the routes sought by Tex Mex in this proceeding, *see*, UP/SP-272, V.S. King at 3, has now discovered that it does indeed have "operational or service" objections respecting Tex Mex's choice of routes through Houston.²⁰

The East Belt Route: Perceived Flaws. UP/SP insists that operation by Tex Mex over the East Belt route would be in no one's best interests, not even Tex Mex's.

First, UP/SP contends that the East Belt route is significantly congested and has critical operating bottlenecks that would impair Tex Mex's operations, and that adding Tex Mex's trains to this route will make these problems worse for

²⁰ These new objections are advanced on behalf of both UP/SP and HB&T. *See*, HB&T-1 at 1 (HB&T has authorized UP/SP to address two issues on HB&T's behalf; one such issue concerns Tex Mex's Houston routes).

all of the other Houston railroads, resulting in excessive delay and inefficiency. The East Belt route, UP/SP claims, handles considerably more traffic than the West Belt route, primarily because the East Belt route receives heavy use for switching and transfer moves. UP/SP indicates, by way of example, that in June 1996 the East Belt carried 32% more trains than the West Belt (628 trains vs. 476 trains). And, UP/SP adds, the East Belt route is operationally inferior to the West Belt route in several respects: the East Belt route has three interlocking towers (Towers 85, 86, and 87); a portion of the East Belt route is reduced to single-track over the San Jacinto River; and Tower 87 is located at an at-grade crossing of the double-track portion of the East Belt route and a double-track portion of SP's Houston-Beaumont mainline (this crossing is directly in the center of SP's Englewood Yard and is at the south leads of UP's Settegast Yard).

Second, UP/SP notes that the East Belt route runs through the middle of UP's Settegast Yard. Settegast Yard, UP/SP claims, is designed as a classification yard only; it works around the clock with its 29 switch engine shifts handling almost 700,000 cars per year; and it originates between 15 and 20 through freights, locals, and transfer jobs per day. There are, UP/SP insists, no mainline or "through" tracks in Settegast Yard, and it would be virtually impossible to maintain efficient yard operations if Tex Mex were allowed to move trains through the yard. Movement of a train through Settegast Yard, UP/SP claims, would require that up to 15 switches be aligned; and this, UP/SP adds, would be a time consuming process because these switches would have to be set and reset manually. Disruption of the yard for even an hour to allow a Tex Mex train to pass through the yard, UP/SP warns, would disrupt switching operations and delay cars for both local and out-of-town customers. UP/SP suggests that these delays could be mitigated only with the construction of (1) a new connection sufficiently east of Settegast Junction to avoid conflict with the north switch leads at Settegast Yard and (2) a lengthy bypass track around the east side of Settegast Yard that could be devoted to through movements. And, UP/SP warns, at the present time, given the existing congestion in this area (including difficulty getting onto UP's mainline at Settegast Junction and the serious bottleneck at SP's Tower 87), Tex Mex trains

would typically require 4 hours to operate over the 11.8-mile East Belt segment between T&NO Junction and Settegast Junction.²¹

Third, UP/SP claims that the East Belt route does not allow efficient connection with HB&T. UP/SP claims that HB&T's Congress Street Yard (which is located adjacent to the West Belt route, and which is not reachable from the East Belt route) is an underutilized yard with sufficient available capacity, and is the only yard where HB&T could efficiently handle Tex Mex's interchange and local business. UP/SP insists that all other HB&T yards potentially suitable for use in handling Tex Mex traffic, including New South Yard, are already being fully utilized for classification of inbound trains and blocking of outbound trains, and are not available to provide support for interchange. UP/SP therefore envisions that, except for trains that Tex Mex may agree to interchange directly to other railroads at mutually-agreed points in Houston, Tex Mex will pick up and deliver its Houston-interchange and local traffic at HB&T's Congress Street Yard.

Fourth, UP/SP claims that the East Belt route does not allow efficient connection with PTRR. UP/SP insists that the operation envisioned by Tex Mex (pick-up and delivery of cars at PTRR's North Yard by Tex Mex through trains) is inconsistent with the operations of all other Houston railroads (which pick up and deliver cars at PTRR's North Yard via either a switch move, a dedicated yard transfer, or an entire train). The operation envisioned by Tex Mex, UP/SP warns, would require the Tex Mex through train to stop on the East Belt route between Towers 86 and 87, which would force HB&T to stop switching at Basin Yard and at PTRR's lead at the north end of North Yard, and would block UP's "Houston North Shore" line to Baytown. And, UP/SP adds, if a Tex Mex train were to exceed a mile in length, it would also block Tower 86 and extend to Bridge Junction (single main), thereby completely

²¹ UP/SP notes that, at the present time, UP runs through trains through Settegast Yard only in the rare instances in which no other alternative is available. UP/SP adds that, at the present time, UP routinely uses what it calls the Gulf Coast Junction-Settegast Junction bypass route to avoid operating through Settegast Yard. This bypass route appears to run: (1) over HB&T (via Pierce Yard), from a point in the vicinity of SP Tower 87 to Gulf Coast Junction; and (2) over UP, from Gulf Coast Junction to Settegast Junction. Tex Mex has not been awarded, and UP/SP apparently has not offered, trackage rights over the first segment; but Tex Mex has been awarded trackage rights over the second segment (this is a portion of the UP main line option). UP/SP and Tex Mex might wish to consider this matter further.

stopping all through train operations on the East Belt route. The railroads in Houston, UP/SP contends, long ago recognized that operations such as this would cause unacceptable inefficiencies and delays, and, for this reason, no railroad stops its through trains on the East Belt route to pick up or set out PTRAs as Tex Mex proposes to do. UP/SP insists that, if Tex Mex wants to interchange directly with PTRAs at North Yard, it should establish a yard operation in Houston and put on the required transfer job. This, UP/SP adds, would be consistent with the operations of other railroads and would avoid the unreasonable delay caused by stopping through trains on the East Belt route (thereby blocking its use by all railroads) for the purpose of picking up or setting out cars.

The SP Route: Perceived Flaws. As to the SP route, UP/SP claims that use of this route would not allow Tex Mex to achieve its connections at Houston and would pose other problems as well. The SP route, UP/SP claims, includes a single-track segment between Chaney Junction and Hardy Street, which is the primary line used by SP for all of its movements in all directions through Houston; and it is not uncommon for trains to be held out on the double track portion of this line when Englewood Yard is congested. UP/SP concedes that the other main track would appear to be available for use, but notes that the entire line between West Junction and Englewood Yard is dispatched according to "current of traffic" rules, and therefore claims that any Tex Mex movements would incur significant delays either waiting behind SP trains or moving at restricted speed against the current of traffic.

Two Routes vs. One. UP/SP has also suggested that it should not be required to provide Tex Mex with two separate routes through Houston. Tex Mex, UP/SP insists, simply has no need for two routes, and UP/SP adds that neither UP nor BNSF has two separate routes today. UP/SP also contends that it would be especially inappropriate and disruptive if Tex Mex were able to dictate on a train-by-train basis which of the routes it would use, thereby creating uncertainty for all carriers' Houston-area operations. The inconsistent routing of Tex Mex trains via two different routes, UP/SP fears, would prevent the dispatching railroad (UP/SP) from developing a consistent transportation plan that would allow the efficient routing of all trains through Houston. It would also, UP/SP adds, negatively affect UP/SP's ability to do capacity planning.

The West Belt Route: UP/SP's Proposed Solution. UP/SP has proposed that Tex Mex utilize, in lieu of the SP and East Belt routes sought by Tex Mex

and awarded in *Decision No. 44*, the West Belt route not sought by Tex Mex and not awarded in *Decision No. 44*. The West Belt route, UP/SP claims, is entirely double-tracked and CTC-controlled,²² it avoids Settegast Yard altogether, and it makes use of through tracks that traverse no bottlenecks comparable to the congestion at Tower 87 and Englewood Yard or the single-track operation over the San Jacinto River bridge. The West Belt route, UP/SP adds, will enable Tex Mex to conduct its operations without disrupting the operations conducted by other railroads, and will allow Tex Mex to achieve all of its operating objectives: (1) efficient movement of through trains, with minimal delay and congestion and in a manner consistent with the operations of other railroads; (2) efficient connection with HB&T and PTR A; and (3) efficient use of HB&T services to perform switching and interchange with other carriers. The West Belt route, UP/SP adds, is strongly favored by HB&T; it is the very route used by UP for movements through Houston; it is BNSF's primary route through Houston; and it is far superior for Tex Mex's purposes to either the SP route or the East Belt route. Tex Mex trains using the West Belt route, UP/SP claims, would require only 1 to 2 hours to operate over the 10-mile West Belt segment between T&NO Junction and Gulf Coast Junction, as compared to the 4 hours that would typically be required to operate over the 11.8-mile East Belt segment between T&NO Junction and Settegast Junction.

UP/SP adds that the West Belt route would allow Tex Mex trains to set out and pick up all of Tex Mex's Houston-area traffic (including that interchanged with HB&T and PTR A) at one point: HB&T's Congress Street Yard. Performing pick-ups and set-outs at HB&T's Congress Street Yard, UP/SP insists, would not interfere with mainline operations, whereas performing pick-ups and set-outs at PTR A's North Yard would most certainly interfere with mainline operations. UP/SP claims that HB&T would perform efficient moves for Tex Mex between Congress Street Yard and North Yard (as well as between Congress Street Yard and other interchange points and HB&T-served industries); UP/SP also claims that HB&T has offered to move Tex Mex cars between Congress Street Yard and North Yard for \$100 per car (round trip); and UP/SP further claims that this rate would only marginally cover HB&T's cost. UP/SP adds that it envisions that Tex Mex would also be allowed to operate full

²² CTC is the acronym for Centralized Traffic Control.

trains or dedicated switch or transfer moves directly to/from North Yard (or other points, as PTRAs might permit) over terminal trackage rights on HB&T between Congress Street Yard (or T&NO Junction) and North Yard.

UP/SP claims that Tex Mex and HB&T operations would be most efficient if Tex Mex were to use the West Belt route and HB&T's Congress Street Yard, rather than the routes awarded in *Decision No. 44*. UP/SP adds that Tex Mex itself has acknowledged the superiority of the West Belt route and, at one point, even indicated its acceptance of HB&T's \$100 per car offer, but that Tex Mex has since sought to tie its acceptance of the West Belt route to UP/SP's acquiescence in terms for Tex Mex's use of HB&T's services that would allegedly be non-compensatory and that would place Tex Mex at a distinct competitive advantage to UP/SP. UP/SP suggests that this aspect of Tex Mex's negotiating strategy may reflect the influence of KCS. *See*, UP/SP-272 at 6; UP/SP-272, V.S. King at 10 n.6.²³

Bypass Construction: UP/SP's Alternative Solution. UP/SP adds that, if Tex Mex insists on using the East Belt route awarded in *Decision No. 44*, Tex Mex must be required to pay for the construction of a bypass track that will avoid the need to operate through the middle of Settegast Yard.²⁴

TEX MEX'S RESPONSE TO UP/SP'S NEW ARGUMENTS. Tex Mex indicates that it would prefer to keep the SP and East Belt routes that it sought in the Sub-Nos. 13 and 14 dockets and that we awarded in *Decision No. 44*. Tex Mex notes that it explained in its Sub-Nos. 13 and 14 applications that these routes were sought *both* to give Tex Mex effective connections to HB&T and to PTRAs and to various yards *and* to provide an alternative route through Houston in the event of congestion. The West Belt route now proposed by

²³ *See*, *Decision No. 44*, 1 S.T.B. at 272 n.41 (the corporate parent of KCS holds a 49% interest in Tex Mex). Tex Mex acknowledges that, during the course of its negotiations with UP/SP, it consulted with KCS' corporate parent and relied on the "substantial expertise" of KCS. Tex Mex adds, however, that neither KCS nor KCS' corporate parent controls Tex Mex, and Tex Mex insists that KCS did not have "the decisive voice" in determining Tex Mex's position on any issue. *See*, TM-45 at 4 n.3.

²⁴ Although UP/SP has suggested that the Settegast Yard problem could be mitigated only with construction of *both* a new connection east of Settegast Junction *and* a bypass track around Settegast Yard, *see*, UP/SP-272, V.S. King at 5 n.4, UP/SP has apparently asked that Tex Mex be required to pay for the bypass track only, *see*, UP/SP-272 at 7 (*see also*, UP/SP-272, V.S. King at 6-7).

UP/SP, Tex Mex insists, is not acceptable, mainly because it would seriously impair the operational and economic effectiveness of Tex Mex's important right to interchange traffic with PTR, especially at North Yard.

Tex Mex also asks that we make clear that UP/SP has no right to carry out its threat to bar Tex Mex from traversing Settegast Yard until Tex Mex constructs another track around the yard. UP/SP, Tex Mex insists, would have no basis whatever for imposing any such effectively prohibitive condition, but is required to make its facilities available to Tex Mex on the same terms and conditions that govern its availability to UP/SP.

OUR ANALYSIS. In *Decision No. 44*, we allowed the interested parties (Tex Mex and UP/SP, with respect to the Sub-No. 13 trackage rights; Tex Mex and HB&T, with respect to the Sub-No. 14 trackage rights) an opportunity to reach agreements with respect to the precise details of the trackage rights awarded to Tex Mex, and we directed that, if agreements could not be reached, the parties should submit separate proposals respecting such precise details. See, *Decision No. 44*, 1 S.T.B. at 425-26. We envisioned that, if agreements could not be reached, the parties would submit separate proposals respecting the precise details of the trackage rights we had awarded, but not that UP/SP would submit a pleading that constitutes in essence a petition for reconsideration with respect to this aspect of *Decision No. 44*, nor that UP/SP would rely upon new evidence that not only could have been presented in its April 29th rebuttal submission but that is plainly inconsistent with the evidence that was presented in its April 29th rebuttal submission. We therefore wish to clarify that, unless and until the parties mutually agree otherwise (or unless and until *Decision No. 44* is changed on administrative reconsideration or judicial review, or in the exercise of the continuing jurisdiction referenced in the next paragraph), UP/SP and HB&T must allow Tex Mex to implement the specific trackage rights awarded in *Decision No. 44*.²⁵

We are not rejecting out of hand, however, the concerns raised by UP/SP respecting Tex Mex's operations through and in the Houston terminal area. UP/SP may be right in that Tex Mex's operations over the East Belt route may have the potential to impose burdens upon UP/SP, HB&T, and their shippers

²⁵ We note that, because UP/SP has elected the UP main line option, the specific trackage rights awarded in *Decision No. 44* no longer include the SP main line option.

that outweigh the beneficial, remedial effects of our partial grant of the Tex Mex applications. We believe, however, that, even aside from the oversight condition imposed in *Decision No. 44*, the continuing jurisdiction explicitly provided by 49 U.S.C. 11351 and implicitly provided by 49 U.S.C. 11103 will enable us to correct any problems created by Tex Mex's operations through and in the Houston terminal area; and all concerned should understand that we are prepared to exercise that continuing jurisdiction if necessary and as appropriate.

We hope that Tex Mex, UP/SP, and HB&T will reach mutually acceptable agreements making further action on our part unnecessary, and we offer the following additional guidance respecting the Tex Mex trackage rights awarded in *Decision No. 44*.

(1) We granted Tex Mex trackage rights over the SP route and over the East Belt route for the reasons mentioned by Tex Mex: (a) to allow Tex Mex effective connections to HB&T, to PTRA, and to various yards; and (b) to provide an alternative route through Houston in the event of congestion. Tex Mex has the right to insist that any realignment of its Houston routes provide both effective connections and an alternative route.

(2) We are not persuaded by the argument that there cannot possibly be any justification for providing Tex Mex two routes through Houston as opposed to only one. The congestion that exists in the Houston terminal area, congestion that is not always shared equally by each of the available routes, provides ample justification for a bypass route.

(3) We can see the benefits of both sides of the argument whether Tex Mex should be allowed to pick and choose among its routes on a train-by-train basis. On the one hand, we agree that Tex Mex's choice of routes should not be on a purely random basis because an entirely arbitrary approach would provide no benefits to Tex Mex and could have an adverse impact on UP/SP's (and/or HB&T's) ability to develop a consistent transportation plan and to do capacity planning. On the other hand, congestion problems or traffic mixes may effectively require Tex Mex to pick and choose among its routes on a train-by-train basis. Moreover, actual experience may demonstrate that, as a practical matter, "pick and choose" presents no real problem at all.

(4) We are not persuaded by UP/SP's arguments respecting the SP route. UP/SP is contending, in essence, that the SP route is already congested and that it would prefer to keep that route for itself alone. Neither contention provides any justification for keeping Tex Mex's trains off the SP route.

(5) We readily concede, however, that we are troubled by the arguments that have been presented respecting the East Belt route. Tex Mex's only specific argument for insisting upon the East Belt route is that this route provides better access (better from the operational and economic perspectives) to PTR's North Yard. This argument, while valid, must be weighed against UP/SP's arguments respecting the problems that will be created by Tex Mex's use of the East Belt route. Tex Mex, as previously noted, has a right to insist upon an "effective" connection to PTR, but this right must be harmonized with the rights of other carriers to conduct "effective" operations in the Houston terminal area. We will not allow Tex Mex to remain on the East Belt route if its operations on that route impose burdens upon UP/SP and HB&T out of proportion to the remedial benefits (to the public) of our partial grant of the Tex Mex applications.

(6) With respect to Settegast Yard, UP/SP claims that it will be virtually impossible to maintain efficient yard operations if Tex Mex is allowed to move trains through the yard, and UP/SP therefore contends that, if Tex Mex insists on using the East Belt route, Tex Mex must be required to pay for the construction of a bypass track. We are leaving the question open as to whether Tex Mex should be required to pay for a bypass, because we do not have a sufficient evidentiary record upon which to render judgment. We note, in this connection, that UP/SP has acknowledged that, on occasion, it has run through trains of its own through Settegast Yard, though UP/SP has added that it has done so only "very rarely," *see*, UP/SP-272, V.S. King at 6. What "very rarely" means in this context is not clear. If, by way of illustration, running a train through Settegast Yard causes the major disruption claimed by UP/SP, and if Tex Mex has three such trains per day whereas UP has only one such train per year, a requirement that Tex Mex pay for a bypass might well be justified. If, however, Tex Mex has three such trains per day and UP has two such trains per day, the situation would be entirely different. And, in any event, the parties

should first consider the possible availability of the previously referenced Gulf Coast Junction-Settegast Junction bypass route.²⁶

(7) With respect to North Yard, we are troubled by UP/SP's claims that the operation envisioned by Tex Mex: (a) is inconsistent with the operations of all other Houston railroads; and (b) will cause major disruptions on the East Belt route. The mere fact of inconsistency is not, in and of itself, a problem; the disruption is the problem. The inconsistency is relevant, however, if, as UP/SP claims, the reason that other railroads do not conduct such operations is because they have recognized that such operations will inevitably produce major disruptions.

(8) We emphasize that the guidance we have provided in the preceding seven paragraphs does not in any way invalidate the clarification entered earlier in this decision; that is, unless and until the parties mutually agree otherwise (or unless and until *Decision No. 44* is changed on administrative reconsideration or judicial review, or in the exercise of our continuing jurisdiction), UP/SP and HB&T must allow Tex Mex to implement the specific trackage rights awarded in *Decision No. 44*.

(9) We encourage UP/SP, HB&T, and Tex Mex to make every effort to resolve in mutually beneficial negotiations all disputed matters respecting the Houston terminal area routes open to Tex Mex. These matters can best be resolved by reasonable negotiators who are familiar with the details of daily rail operations in Houston. And, as we noted in *Decision No. 44*, we encourage all concerned to submit to arbitration any matters that cannot be resolved by negotiation. See, *Decision No. 44*, 1 S.T.B. at 432-33.

THE LAREDO-ROBSTOWN-CORPUS CHRISTI RESTRICTION. The Sub-Nos. 13 and 14 trackage rights granted to Tex Mex in *Decision No. 44* are subject to one restriction: that all freight handled by Tex Mex pursuant to such trackage rights must have a prior or subsequent movement on Tex Mex's Laredo-Robstown-Corpus Christi line. See *Decision No. 44*, 1 S.T.B. at 421-26. UP/SP, attempting to reconstruct our partial grant of Tex Mex's applications, has proposed that Tex Mex's trackage rights be limited to freight "that moves over

²⁶ Tex Mex has argued, and as respects Tex Mex's through trains we agree, that UP/SP must make Settegast Yard available to Tex Mex on the same terms and conditions that govern its availability to UP/SP. The problem with this approach, however, is that, if Settegast Yard is not available to UP/SP's through trains, it will not be available to Tex Mex's through trains either.

Tex Mex's Laredo-Robstown-Corpus Christi Line to/from (i) Laredo or (ii) points on Tex Mex's Laredo-Robstown-Corpus Christi Line not currently served by MP or SP." UP/SP-272 at 8. The limitation proposed by UP/SP would effectively prevent Tex Mex from using its trackage rights to handle freight moving from/to shippers or port facilities in Corpus Christi.²⁷

OUR ANALYSIS. We again reject UP/SP's "petition for reconsideration" approach (premised, this time, upon an allegation of material error) to our directive that the parties, if unable to reach agreement with respect to the precise details of the trackage rights awarded to Tex Mex, should submit separate proposals respecting such precise details. *See, Decision No. 44*, 1 S.T.B. at 425. We adhere to our rationale for granting Tex Mex the trackage rights sought in its Sub-Nos. 13 and 14 applications, subject only to the restriction respecting traffic having a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line. *See, Decision No. 44*, 1 S.T.B. at 421-26. We therefore reject the more restrictive limitation proposed by UP/SP, and we direct UP/SP to accept the formulation proposed by Tex Mex, *see* TM-41 at 11 ("provided that all freight handled by Tex Mex pursuant to such rights must have a prior or subsequent movement on Tex Mex's Laredo-Robstown-Corpus Christi line").

LOCAL SHIPPERS. In its applications filed in the Sub-Nos. 13 and 14 dockets, Tex Mex clearly indicated that the trackage rights it sought were intended to allow Tex Mex both to transport overhead traffic and to serve all local shippers currently capable of receiving service from both UP and SP, directly or through reciprocal switching. *See, Decision No. 44*, 1 S.T.B. at 272-73. In granting Tex Mex the trackage rights it sought (subject only to the restriction respecting traffic having a prior or subsequent movement on Tex Mex's own line), we did not explicitly state that Tex Mex would be allowed to serve 2-to-1 shippers at points on the trackage rights lines; but we did indicate that the only restriction we were imposing on the trackage rights sought by Tex Mex was the prior/subsequent restriction. *See, Decision No. 44*, 1 S.T.B. at 421-26.

²⁷ BNSF, taking a position much akin to UP/SP's, contends that we could not have intended to award Tex Mex trackage rights that would allow Tex Mex to carry freight between Houston/Beaumont and the Port of Corpus Christi. BN/SF-64 at 6-8.

UP/SP has proposed that Tex Mex's trackage rights over UP/SP be overhead rights only, without the ability to switch or serve any shippers on the UP/SP lines. UP/SP concedes that Tex Mex sought local shipper access in its Sub-No. 13 responsive application, but UP/SP notes that it vigorously opposed such access and that we gave Tex Mex only a "partial grant" of its responsive application without explicitly addressing this issue. UP/SP contends: that all 2-to-1 shippers at points on the Tex Mex trackage rights lines will be served by both BNSF and UP/SP;²⁸ that access by Tex Mex to such shippers would be unjustified, in that such access would interject a third carrier where there have previously been only two; and that such access would also create operational headaches (e.g., requiring switching by or to three carriers rather than two) and dilute the traffic available to BNSF and UP/SP, thereby degrading the level of service that can be provided to these shippers.²⁹

OUR ANALYSIS. We adhere to our rationale for granting Tex Mex the trackage rights sought in its Sub-Nos. 13 and 14 applications, subject only to the restriction respecting traffic having a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line. *See, Decision No. 44*, 1 S.T.B. at 421-26. Our "partial grant" was made "partial" only by the prior/subsequent restriction; aside from that restriction, we intended to grant Tex Mex all of the trackage rights it had sought, including access to 2-to-1 shippers. UP/SP's analysis overlooks that we granted Tex Mex its trackage rights *both* to preserve a competitive routing at Laredo *and* to preserve the essential services now provided by Tex Mex. *See, Decision No. 44*, 1 S.T.B. at 423. The operational and traffic dilution problems mentioned by UP/SP are not frivolous, but these problems must be balanced against our purposes in granting Tex Mex its trackage rights; and the balance, in our judgment, weighs in favor of allowing Tex Mex access to the 2-to-1 shippers. We therefore direct UP/SP to accept the formulation proposed by Tex Mex, *see*, TM-41 at 12 ("User shall have the right to serve all shippers currently capable of receiving service from both MP

²⁸ UP/SP indicates that the 2-to-1 points on the Tex Mex trackage rights lines are Sinton, Victoria, Sugar Land, and Amelia.

²⁹ BNSF, taking a position much akin to UP/SP's, contends that there is no rational basis for awarding Tex Mex access to the 2-to-1 points between Corpus Christi and Beaumont. BN/SF-64 at 3-6.

and SP, directly or through reciprocal switch"). We think it appropriate to add, however, that in adopting this formulation we have in mind that Tex Mex will have access only to "2-to-1" shippers, by which we mean shippers that prior to the merger had access to UP and to SP and to no other railroad.³⁰

COMPENSATION. We indicated in *Decision No. 44* that, if we were required to prescribe compensation terms with respect to the Sub-No. 13 trackage rights, we would look to the terms and conditions in the BNSF agreement, as well as the principles announced in *St. Louis & Southwestern Ry. Co. Compensation--Trackage Rights*, 1 I.C.C.2d 776 (1984), 4 I.C.C.2d 668 (1988), 5 I.C.C.2d 525 (1989), 8 I.C.C.2d 80 (1991), and 8 I.C.C.2d 213 (1991), *aff'd without opinion*, 978 F.2d 745 (D.C. Cir. 1992), *cert. denied*, 508 U.S. 951 (1993) (the *SSW Compensation* cases). See, *Decision No. 44*, 1 S.T.B. at 425. We further indicated in *Decision No. 44* that, if we were required to prescribe compensation terms with respect to the Sub-No. 14 trackage rights, we would apply the principles for compensation in condemnation proceedings as required by 49 U.S.C. 11103(a) (third sentence). See, *Decision No. 44*, 1 S.T.B. at 425-26.

UP/SP'S APPROACH: SUB-NO. 13. UP/SP has proposed that Tex Mex compensate UP/SP for use of its Sub-No. 13 trackage rights at a flat rate of 3.84 mills per gross ton-mile (GTM) for all equipment. This rate, UP/SP insists, is consistent with the *SSW Compensation* approach. Indeed, UP/SP adds, its 3.84 mills proposal is quite generous because (so UP/SP claims) we indicated in *Decision No. 44* that a rate of 3.84 mills per GTM was the absolute minimum that the *SSW Compensation* capitalized earnings method would yield. See, *Decision No. 44*, 1 S.T.B. at 415. UP/SP contends that 3.84 mills is actually a good deal below the absolute minimum, both because the 3.84 mills calculation was based solely on the less expensive SP properties rather than on a mix of SP and UP properties such as Tex Mex will operate over and also because that calculation relied on historical Uniform Railroad Costing System (URCS) costs that understate the actual maintenance expenses UP/SP will incur on the SP lines.

³⁰ As UP/SP notes, the formulation proposed by Tex Mex might be interpreted as allowing Tex Mex access to shippers currently open to three carriers (UP, SP, and a third carrier). We wish to clarify that, except for shippers located on HB&T and PTRR (to which Tex Mex will have access via HB&T and PTRR, respectively), the only shippers on the trackage rights lines open to Tex Mex will be 2-to-1 shippers. See, UP/SP-272 at 12 n.16.

UP/SP acknowledges that a rate of 3.84 mills per GTM is higher than the rates provided for in the BNSF agreement (3.0 mills per GTM for unit trains; 3.1 mills per GTM for other traffic). UP/SP contends, however, that the rates provided for in the BNSF agreement are not the rates that we would have imposed under *SSW Compensation*. See, *Decision No. 44*, 1 S.T.B. at 414 (we indicated that the rates provided for in the BNSF agreement were lower than the rates we would have set under *SSW Compensation*). UP/SP notes that there were compelling reasons why it voluntarily agreed with BNSF on compensation at a lower level than it would have agreed to outside the context of this particular contract with BNSF and lower than the level that we would have prescribed under *SSW Compensation*. UP/SP argues that this is so because the BNSF agreement was not merely a one-way grant of rights to BNSF, but involved an exchange of rights beneficial to both parties.

UP/SP insists that the compensation paid by Tex Mex and BNSF need not be the same in order to fulfill the purpose of the grant to Tex Mex. The 3.84 mills rate, UP/SP maintains, is only marginally higher than the rate that BNSF will pay, and will allow Tex Mex to retain enough traffic to/from Laredo to remain an effective competitor there, given Tex Mex's new ability to connect with KCS at Beaumont and with HB&T and PTRR in Houston (and given also that BNSF and Tex Mex will interchange substantial volumes of traffic for movement via Laredo).

TEX MEX'S APPROACH: SUB-NO. 13. Tex Mex has proposed that we apply to its Sub-No. 13 trackage rights the rates provided for in the BNSF agreement: 3.0 mills per GTM for unit-train traffic and 3.1 mills per GTM for intermodal and carload traffic with annual adjustments based on 70% of the changes in the unadjusted Rail Cost Adjustment Factor (RCAF).

The *SSW Compensation* principles, Tex Mex insists, require the imposition of compensation terms that approximate fair market value, and Tex Mex claims that there can be no better evidence of fair market value than the compensation for very similar trackage rights that was recently negotiated at arm's-length by railroads of equal bargaining power in the BNSF agreement. Tex Mex suggests that the fact that a capitalized earnings methodology might produce a rate of 3.84 mills should not be a decisive consideration. The capitalized earnings method, Tex Mex argues, is merely one type of evidence of fair market value that can be used in the absence of any better evidence.

Tex Mex adds that the rates provided for in the BNSF agreement may in fact be greater than the rates the market would set for the Tex Mex trackage rights. The BNSF trackage rights, Tex Mex notes, include the right to serve all new facilities, including transload facilities, that are located hereafter at any points on the lines over which BNSF will operate. The Tex Mex route from Robstown to Houston and Beaumont, Tex Mex adds, is substantially more circuitous than BNSF's route between those points. And Tex Mex also adds that, according to UP/SP's own evidence, the Tex Mex route is substantially inferior to the BNSF route in terms of track condition and signalling. Tex Mex therefore concludes that a rate of 3.1 and 3.0 mills for the rights obtained by Tex Mex is more than reasonable from UP/SP's standpoint.

Tex Mex further contends that it would be competitively disadvantaged vis-à-vis BNSF if its trackage rights payments were significantly higher than BNSF's. And, Tex Mex adds, given the extremely thin margin projected for Tex Mex's income with its restricted trackage rights, there is some question whether Tex Mex could in fact cover its expenses at the higher fee.

UP/SP'S APPROACH: SUB-NO. 14. UP/SP, speaking on behalf of HB&T, indicates that there has not been sufficient time to perform an appraisal of the underlying value of HB&T's property, as would be required by the 49 U.S.C. 11103(a) condemnation approach. UP/SP therefore suggests that, once we have determined the route to be used by Tex Mex in Houston, we establish a schedule to receive evidence on the reconstruction cost new less depreciation value of the pertinent assets, which, according to UP/SP, is the key variable that drives the level of compensation under condemnation principles. UP/SP suggests 30 days for initial evidentiary submissions and an additional 30 days for replies. Anticipating that Tex Mex's trackage rights operations will commence prior to our resolution of the Sub-No. 14 compensation terms, UP/SP suggests that HB&T should receive interest on arrearages at the railroad cost of capital.³¹

³¹ HB&T adds that the 3.0/3.1 mills rates provided for in the BNSF agreement should not be applied to the Sub-No. 14 trackage rights. Those rates are inappropriate, HB&T insists, because whereas UP/SP's lines are for the most part rural mainlines, HB&T's lines are in the nature of a costly urban interlocking plant. See, HB&T-1 at 1 n.1.

TEX MEX'S APPROACH: SUB-NO. 14. Tex Mex has proposed that we apply to its Sub-No. 14 trackage rights the 3.0/3.1 mills rates provided for in the BNSF agreement. The principles for compensation terms in condemnation proceedings, Tex Mex maintains, require that compensation should be set at the level to which two parties, negotiating at arm's-length, would agree, putting the owner in a position as good as, but no better than, the position it was in before the condemnation. Here, Tex Mex notes, the two co-owners of HB&T (UP/SP and BNSF) have submitted, in rates provided for in the BNSF agreement, the best evidence of the proper level of compensation for the Sub-No. 14 trackage rights.³²

OUR ANALYSIS. As explained below, we will impose a flat rate of 3.84 mills per GTM for all equipment as trackage rights compensation to be paid by Tex Mex to UP/SP (in Sub-No. 13) and to HB&T (in Sub-No. 14), with annual adjustments based on 70% of the unadjusted RCAF.

In Sub-No. 13, Tex Mex has argued that principles in the *SSW Compensation* cases would lead to our imposition of the compensation terms agreed to by UP/SP and BNSF, because these best approximate the fair market value of trackage rights over UP/SP's track. This is incorrect. UP/SP has explained that the compensation terms agreed to with BNSF, which we have found to be lower than what we would impose under *SSW Compensation*, were a component of a far broader arrangement through which UP/SP received other rights in return.³³ While these other rights were not necessary to satisfy our concerns over merger-related competitive harm, they are generally procompetitive and confer significant value to UP/SP. In contrast, no

³² As respects future adjustments, Tex Mex has apparently either proposed or indicated that it would accept either: quarterly adjustments reflecting changes in the RCAF, adjusted for changes in productivity, *see*, TM-40 at 6; or annual adjustments reflecting changes in the RCAF, adjusted for changes in productivity, *see*, TM-40, Draft Trackage Rights Agreement at iv-v; or annual adjustments reflecting changes in UP/SP's system average URCS costs for the categories of maintenance and operating costs covered by the trackage rights fees, *see*, TM-40 at 6.

³³ Among the benefits UP/SP received from BNSF as components of this arrangement were: (1) trackage rights between Chemult and Bend; (2) trackage rights between Mojave and Barstow; (3) a proportional rate agreement for traffic moving over the Portland gateway; (4) improved access to the ports of Seattle, Portland, and Superior; and (5) new connections between UP /SP and BNSF in Illinois to permit more efficient access to UP/SP's facilities in Chicago. *See*, *Decision No. 44*, 1 S.T.B. at 253-54, and UP/SP-272 at 16.

ancillary rights to UP/SP are included in the Tex Mex trackage rights we imposed in *Decision No. 44*.

We have already found the compensation terms proposed by UP/SP (in Sub-No. 13), a flat rate of 3.84 mills per GTM for all equipment, to be no higher than the compensation terms we would impose under our favored *SSW Compensation* standard, the capitalized earnings method. See, *Decision No. 44*, 1 S.T.B. at 415. We will impose this as the compensation amount here, with annual adjustments based on 70% of the unadjusted RCAF. This annual adjustment has been agreed to by UP/SP and BNSF, and Tex Mex has stated its willingness to be bound by this adjustment as well.

In Sub-No. 14, we believe that the principles of *SSW Compensation* would also satisfy the principles for compensation in condemnation proceedings. The capitalized earnings method, however, does not appear to lend itself directly to a determination of fair market value of terminal trackage rights over a belt railroad such as HB&T. UP/SP has suggested that an alternative, fallback *SSW Compensation* method, reconstruction cost new less depreciation, should be used. While this might be appropriate if HB&T were, like KCS at Beaumont and Shreveport, a true "innocent third party" upon which we had imposed terminal trackage rights,³⁴ that is not the case here. HB&T's two owners are UP/SP and BNSF, and it is being represented here by UP/SP. Further, HB&T did not choose to contest Tex Mex's Sub-No. 14 application during the pendency of the UP/SP proceeding, and we note that the Sub-No. 14 trackage rights represent only about 5% of the total trackage rights (by mileage) we have granted to Tex Mex. In these circumstances we will impose the same compensation terms and annual adjustments in the Sub-No. 14 proceeding that we have imposed above in the Sub-No. 13 proceeding.

We do not share Tex Mex's concern that it will not be an effective competitor at the fee we are imposing here. As we explained in *Decision No. 44*:

³⁴ See, *Decision No. 44*, 1 S.T.B. at 446-450.

The "below the wheel" variable costs included in the trackage rights fees relate only to the expense of ownership and maintenance of running track and structures. These costs account, on average, for only about 17% of the total variable costs of western railroads.

Decision No. 44, 1 S.T.B. at 417 n.174. Moreover, we expect that shipments using the Tex Mex trackage rights will move a considerable portion of their total distance on Tex Mex itself and/or on KCS, its connection at Beaumont. The trackage rights compensation terms applicable to the Sub-Nos. 13 and 14 trackage rights will not be relevant for those portions of the movements. Thus, the compensation terms we are imposing here should permit Tex Mex to remedy any potential merger-related competitive harm at Laredo, as we intended when we granted its Sub-Nos. 13 and 14 applications.

ADDITIONAL TRACKAGE AND RELATED FACILITIES. Tex Mex and UP/SP have agreed that Tex Mex may be required by UP/SP to construct additional trackage if such trackage is necessary to implement the Sub-No. 13 trackage rights; and Tex Mex and UP/SP have further agreed that, at least initially, the cost and expense of such construction shall be borne solely by Tex Mex. *See*, UP/SP-271, Attachment A, Sections 2(c) and 2(d). Tex Mex and UP/SP have also agreed that Tex Mex may be required by UP/SP to pay for the construction of additional connections and sidings or siding extensions if such facilities are necessary to implement the Sub-No. 13 trackage rights; and Tex Mex and UP/SP have further agreed that, at least initially, the cost and expense of such payment shall be borne solely by Tex Mex. *See*, UP/SP-271, Attachment A, Section 5(a). Tex Mex and UP/SP, however, have not agreed on all aspects of the dispute resolution mechanism that will come into play in those instances in which Tex Mex disputes UP/SP's necessity determination.

UP/SP'S APPROACH. UP/SP has proposed language to the effect that UP/SP may require Tex Mex to construct additional trackage or to pay for the cost of construction of additional facilities if, in either instance, such construction is necessary "in the reasonable judgment" of UP/SP. *See*, UP/SP-271, Attachment A, Sections 2(c), 2(d), and 5(a). UP/SP adds, however, that it understands that any dispute that might arise as to whether UP/SP had correctly determined that such construction was necessary would be arbitrable under Section 6 of the General Conditions set out in Exhibit B. *See*, UP/SP-271, Attachment A, Exhibit B, Section 6. In essence, UP/SP would prefer to construct first and to arbitrate any disputes later; and UP/SP acknowledges that, if its judgment respecting construction is later determined by an arbitrator

to have been incorrect, the arbitrator could require UP/SP to bear the costs of the construction. The approach favored by Tex Mex, UP/SP insists, would allow Tex Mex to delay (pending arbitration) construction that was, in UP/SP's judgment, necessary to allow Tex Mex to operate over UP/SP's lines without causing undue interference to existing operations.

TEX MEX'S APPROACH. Tex Mex has proposed language to the effect that, in any instance, if Tex Mex and UP/SP do not agree that construction is necessary, the dispute shall be submitted to binding arbitration in accordance with Section 6 of the General Conditions, and no such construction shall occur until it is either agreed to by the parties or determined by an arbitrator to be necessary. *See*, UP/SP-271, Attachment A, Sections 2(c), 2(d), and 5(a). Tex Mex's approach differs from UP/SP's in two respects.

First, Tex Mex objects to the formulation that such construction be necessary "in the reasonable judgment" of UP/SP. This formulation, of course, is not objectionable in and of itself, but only in connection with the arbitration proceeding that will occur if Tex Mex disputes UP/SP's necessity determination. Tex Mex insists that, if the matter goes to arbitration, the arbitrator should be asked to decide whether the construction is necessary, not whether UP/SP's determination of necessity was or was not reasonable. The "reasonable judgment" standard, Tex Mex suggests, is inappropriate because it gives the benefit of any doubt to UP/SP.

Second, Tex Mex contends that, if there is a disagreement about a particular project, construction should not go forward until the issue of its necessity has been determined by arbitration. Construction of new connections and lines, Tex Mex claims, could seriously disrupt Tex Mex's operations while construction is underway, and Tex Mex fears that UP/SP could use the power to institute unnecessary projects to harm Tex Mex competitively.

OUR ANALYSIS. We find some merit in both of the dispute resolution mechanisms proposed by UP/SP and Tex Mex. The "construct first and arbitrate later" approach favored by UP/SP, on the one hand, would facilitate UP/SP's operations by allowing for immediate construction of additional trackage or facilities made necessary by Tex Mex's Sub-No. 13 operations. The "arbitrate first and construct later" approach favored by Tex Mex, on the other hand, would protect Tex Mex's operations from the disruption caused by construction of trackage or facilities that were not really required by Tex Mex's Sub-No. 13 operations.

We also find some problems with each of these dispute resolution mechanisms. The "construct first and arbitrate later" approach favored by UP/SP, on the one hand, could cause a needless disruption of ongoing Tex Mex operations, if in fact the additional trackage or facilities were not really required by Tex Mex's Sub-No. 13 operations. The "arbitrate first and construct later" approach favored by Tex Mex, on the other hand, might result in the delay of construction that really was required by Tex Mex's Sub-No. 13 operations.

On balance, we believe that the "construct first and arbitrate later" approach favored by UP/SP is the better of the two approaches, and we therefore direct the parties to adopt it. But we also think that Tex Mex's objection to the "reasonable judgment" formulation is valid. If in any particular instance Tex Mex disputes UP/SP's necessity determination, the arbitrator should be asked to decide whether the construction was necessary, not whether UP/SP's determination of necessity was or was not reasonable; and UP/SP's determination of necessity should not create any sort of presumption that the construction was in fact necessary. Because the "construct first and arbitrate later" language heretofore proposed by UP/SP does not reflect these views, we direct the parties to incorporate language that does.

LABOR PROTECTION. The Sub-No. 13 trackage rights are subject to the labor protective conditions set out in *Norfolk and Western Ry. Co.--Trackage Rights--BN*, 354 I.C.C. 605, 610-15 (1978), as modified in *Mendocino Coast Ry., Inc.--Lease and Operate*, 360 I.C.C. 653, 664 (1980) (*Norfolk and Western*). See, *Decision No. 44*, 1 S.T.B. at 453 n.220 and at 553 (ordering paragraph 60).³⁵

³⁵ See also, *Decision No. 44*, 1 S.T.B. at 524 which provides a correct but incomplete description of the labor protection imposed in the Sub-No. 13 docket. We noted there that "any rail employees of Tex Mex" affected by the Sub-No. 13 trackage rights would be protected by the *Norfolk and Western* conditions, and this is correct; but we neglected to note that any rail employees of either UP or SP affected by the Sub-No. 13 trackage rights would likewise be protected by the *Norfolk and Western* conditions. We think it appropriate to add, however, that, although *Norfolk and Western* protection is available to UP/SP employees affected by the Sub-No. 13 trackage rights, that protection has little practical significance. The UP/SP merger authorization itself is subject to the labor protective conditions set out in *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979) (*New York Dock*). All rail employees of either UP or SP affected by the Sub-No. 13 trackage rights will also be covered by the *New York Dock* conditions imposed on the merger. As noted in *Decision No. 44*, the benefits provided by the *Norfolk and Western* conditions are identical to the benefits provided by

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UP/SP has proposed that Tex Mex be required to reimburse UP/SP for any labor protection payment UP/SP may become obligated to make as a result of Tex Mex's exercise of the Sub-No. 13 trackage rights. Any such labor protection payment, UP/SP contends, should be regarded as an out-of-pocket cost occasioned by Tex Mex's operations.

OUR ANALYSIS. We find that UP/SP should be responsible for its own labor protection obligations, and we therefore reject its proposal that Tex Mex be required to cover UP/SP's labor protection payments. UP/SP may be correct that reimbursement provisions are standard in free-market trackage rights agreements; but those agreements are negotiated on a voluntary basis, and cost-shifting is no doubt one item among many that are subject to the give-and-take of negotiations. We view with skepticism UP/SP's assertion, *see*, UP/SP-272 at 18, that reimbursement provisions are also standard in agreements governing the terms of rights imposed by this agency (or its predecessor) in merger cases. The one relevant reimbursement provision cited by UP/SP, *see*, UP/SP-272 at 18 n.23, does indeed involve rights imposed by the ICC; but such rights, much like the BNSF rights imposed in Decision No. 44, were in fact negotiated on a voluntary basis.

DISPATCHING PROTOCOLS. Tex Mex and UP/SP have agreed that Tex Mex and UP/SP trains operating on "joint trackage" are to be given equal dispatch without any discrimination in promptness, quality of service, or efficiency. *See*, UP/SP-271, Attachment A, Attachment 1, Protocol No. 2. Tex Mex and UP/SP have also agreed to set up a Joint Service Committee, which shall be responsible for establishing rules and standards as appropriate to ensure equitable and non-discriminatory treatment, appropriate maintenance, and efficient joint use of the joint trackage. *See*, UP/SP-271, Attachment A, Exhibit B, Section 2.5. Tex Mex and UP/SP have even agreed that appropriate Tex Mex officials will be admitted "at any time to dispatching facilities and personnel responsible for dispatching the Joint Trackage to review the handling of trains on the Joint Trackage." *See*, UP/SP-271, Attachment A, Attachment 1, Protocol No. 10.

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the *New York Dock* conditions; the two sets of conditions differ only in matters of procedure. *See*, Decision No. 44, 1 S.T.B. at 453.

Tex Mex insists, however, that UP/SP should also be required *both* to provide Tex Mex with an office in UP/SP's Harriman Dispatching Center *and* to pay Tex Mex "an amount equal to the reasonable and conventional salary of one supervisory employee to be placed by Tex Mex" at UP/SP's Harriman Dispatching Center. See UP/SP-271, Attachment A, Attachment 1, Protocol No. 10. See also TM-41 at 19-20. Tex Mex notes, in support of its proposal, that UP/SP has agreed to a similar arrangement with BNSF.

OUR ANALYSIS. We reject Tex Mex's office/salary proposal. BNSF will be operating, on any given day, dozens of trains on over 6,000 miles of UP/SP lines (this includes both BNSF's existing trackage rights on UP and SP as well as those provided for in the BNSF agreement). In this setting, and in the interest of a settlement, UP/SP agreed to an office/salary arrangement that will allow a BNSF employee to be present at UP/SP's Harriman Dispatching Center to monitor the dispatching of BNSF trains. Tex Mex, however, is likely to operate, on UP/SP lines, only a few trains per day, and these will be operated over only a few hundred miles of lines in a geographically confined area. Tex Mex should have no difficulty monitoring performance of these trains and, if necessary, auditing UP/SP's dispatching of them,³⁶ without the need for a Tex Mex employee to be permanently stationed at the Harriman Dispatching Center at UP/SP's expense.

SUB-NO. 14 TERMS. Aside from the disputes (discussed above) respecting routes and compensation, Tex Mex and HB&T apparently have not really engaged in any meaningful discussions respecting the terms of the Sub-No. 14 trackage rights. Compare TM-40 at 7-8 with HB&T-1 at 2. Tex Mex, however, has now submitted a complete Draft Trackage Rights Agreement (attached to TM-40) and has asked us to adopt it. HB&T, which has not submitted a draft of its own, claims that it first saw the Tex Mex draft as an attachment to TM-40; and HB&T asks that we require that the Sub-No. 14 trackage rights be governed by whatever general provisions are to govern the Sub-No. 13 trackage rights, subject to the right of the parties to agree to further adaptations. Under these circumstances, we believe that both parties have been acting in good faith, and that the Sub-No. 14 negotiations have been put into a holding pattern behind the Sub-No. 13 negotiations. Accordingly, we think it

³⁶ UP/SP indicates that computerized records of UP/SP's dispatching are capable of being retrieved in the event of a dispute over a particular dispatching episode. See UP/SP-272 at 21 n.25.

best simply to direct Tex Mex and HB&T to enter into meaningful negotiations respecting the Sub-No. 14 trackage rights.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Except insofar as they mutually agree otherwise, Tex Mex and UP/SP shall enter into a trackage rights agreement respecting the Sub-No. 13 trackage rights consistent with our discussion set forth in this decision.

2. Even if certain details respecting the Sub-No. 13 trackage rights are not resolved prior to September 11, 1996, the Sub-No. 13 trackage rights will nevertheless become effective on that date.

3. Except insofar as they mutually agree otherwise, Tex Mex and HB&T shall enter into a trackage rights agreement respecting the Sub-No. 14 trackage rights consistent with our discussion set forth in this decision.

4. Even if certain details respecting the Sub-No. 14 trackage rights are not resolved prior to September 11, 1996, the Sub-No. 14 trackage rights will nevertheless become effective on that date.

5. Unless and until the parties mutually agree otherwise (or unless and until *Decision No. 44* is changed on administrative reconsideration or judicial review, or in the exercise of our continuing jurisdiction), UP/SP and HB&T must allow Tex Mex to implement the specific trackage rights awarded in *Decision No. 44*.

6. This decision shall be effective on September 11, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.